Subashini a/p Rajasingam v Saravanan a/l Thangathoray

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8–33–994 OF 2006
AZIAH ALI JC
9 OCTOBER 2006

Civil Procedure — Injunction — Application to set aside — Injunction to restrain respondent from continuing with proceedings in Syariah Court — Whether amounted to a stay of proceedings in Syariah Court and ought to be set aside — Specific Relief Act 1950 s 54(b)

Family Law — Divorce — Conversion to Islam — Conversion of one party in civil marriage to Islam — Whether Syariah Court had jurisdiction to decide on dissolution of marriage and custody of child of marriage — Law Reform (Marriage and Divorce) Act 1976 s 51

Islamic Law — Jurisdiction — Syariah Court — Conversion of one party in civil marriage to Islam — Whether Syariah Court had jurisdiction to decide on dissolution of marriage and custody of child of marriage — Law Reform (Marriage and Divorce) Act 1976 s 51 — Islamic Family Law (Federal Territories) Act 1984 s 46(2)

The petitioner and the respondent registered their marriage and subsequently went through a Hindu wedding ceremony on 9 March 2002. They have two children from their marriage, the elder son Dharvin Joshua was born on 11 May 2003 and the younger son Sharvind was born on 16 June 2005. On 11 May 2006, the respondent told the petitioner that he had converted to Islam. The respondent had also converted the elder son Dharvin Joshua to Islam. The petitioner subsequently received a 'Notis Pemakluman' from the Registrar of the Syariah High Court, Kuala Lumpur dated 14 July 2006 notifying her that the respondent had instituted proceedings for custody of the elder son and that the case had been set for hearing on 14 August 2006.

The petitioner then filed a petition for the dissolution of her marriage to the respondent under s 51 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') on the ground of her husband's conversion to Islam. The petitioner then applied for and obtained an ex parte injunction restraining the respondent from, inter alia, commencing or continuing with any proceedings in any Syariah Court with regard to the marriage or the children of the marriage. The respondent then applied to set aside the injunction.

The gist of the petitioner's submissions in support of the injunction was that the jurisdiction to hear and determine all questions relating to the civil marriage between the parties and the children of that marriage vests in the High Court as the marriage

was registered under the provisions of the LRA. It was submitted that the Syariah Court had no jurisdiction as one party to the dispute is not 'a person professing the religion of Islam'. The petitioner's counsel submitted that the balance of convenience favoured the granting of the injunction sought and no prejudice is caused to the respondent as he and the petitioner are entitled to appear before the High Court to be heard. With regard to the injunction order, counsel for the petitioner argued that the order was against the respondent and not against the Syariah Court.

Held, setting aside the injunction and allowing the respondent's application:

(1) The subject matter of the petitioner's application were matters that are expressly provided for in the laws conferring jurisdiction on the Syariah Court thereby excluding the jurisdiction of this court (see para 27).

(2) From the moment of his conversion to Islam, the respondent became a Muslim and is referred to as a muallaf. From then on, he became subject to the same duties and obligations as any other Muslim. As a person professing the religion of Islam, in matters of his personal law, unless expressly provided otherwise, he was subject to the jurisdiction of the Syariah Court which has exclusive jurisdiction over persons professing the religion of Islam. Therefore, he could avail himself of the provisions of s 46(2) of the Islamic Family Law (Federal Territories) Act 1984 ('Act 303') which allows him to apply to the Syariah Court for confirmation of the dissolution of his non-Muslim marriage. Similarly, he could avail himself of the provisions of Part IX of Administration of Islamic Law (Federal Territories) Act 1993 ('Act 505') and Part VII of Act 303. Pursuant to those provisions, the respondent had placed applications before the Syariah Court (see para 28).

(3) The injunction order though addressed at the respondent was in effect a stay of proceedings in the Syariah Court from further hearing and determining the applications placed before it by the respondent. The Syariah Court had exercised its jurisdiction and made orders on his applications as provided for under Act 303 and Act 505. Section 54(b) of the Specific Relief Act 1950 specifically disallows injunctions from being granted to stay proceedings in a court not subordinate to that from which the injunction is sought (see para 29).

[Bahasa Malaysia summary

Pempetisyen dan responden telah mendaftarkan perkahwinan mereka dan seterusnya melangsungkan upacara perkahwinan Hindu pada 9 Mac 2002. Mereka mempunyai dua orang anak hasil daripada perkahwinan tersebut. Anak lelaki sulung Dharvin Joshua telah dilahirkan pada 11 Mei 2003 dan anak lelaki yang bongsu Sharvind telah dilahirkan pada 16 Jun 2005. Pada 11 Mei 2006, responden telah memberitahu pempetisyen bahawa beliau telah memeluk Islam. Responden juga telah menukarkan anak sulungnya Dharwin Joshua kepada Islam. Pempetisyen kemudiannya telah menerima satu 'Notis Pemakluman' daripada Pendaftar Mahkamah Tinggi Syariah, Kuala Lumpur bertarikh 14 Julai 2006 memberitahunya bahawa responden telah

memulakan prosiding untuk hak penjagaan anak lelaki sulung dan kes tersebut telah ditetapkan untuk perbicaraan pada 14 Ogos 2006. A

Pempetisyen kemudiannya telah memfailkan satu petisyen untuk membubarkan perkahwinannya kepada responden di bawah s 51 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('LRA') atas alasan suaminya memeluk Islam. Pempetisyen kemudiannya telah memohon untuk dan telah mendapatkan ex parte injunksi menghalang responden daripada, antara lain, memulakan atau meneruskan dengan apa jua prosiding di mana-mana Mahkamah Syariah berkenaan dengan perkahwinan atau anak-anak dalam perkahwinan. Responden kemudiannya telah memohon untuk mengenepikan injunksi tersebut. B

Intipati hujahan pempetisyen yang menyokong injunksi adalah bidang kuasa untuk mendengar dan menentukan kesemua soalan berkenaan dengan perkahwinan sivil di antara pihak-pihak dan anak-anak dalam perkahwinan terletak kepada Mahkamah Tinggi yang mana perkahwinan tersebut telah didaftarkan di bawah peruntukan LRA. Adalah dihujahkan bahawa Mahkamah Syariah tidak mempunyai bidang kuasa yang mana salah satu pihak terhadap pertikaian adalah bukannya 'seorang yang menganut agama Islam'. Peguam pempetisyen menghujahkan bahawa imbangan kesenangan menyokong keizinan injunksi yang diminta dan tiada berkalunya prejudis kepada responden yang mana beliau dan pempetisyen adalah berhak untuk hadir di hadapan Mahkamah Tinggi untuk didengar. Berkenaan dengan perintah injunksi, peguam pempetisyen menyatakan bahawa perintah adalah terhadap responden dan bukannya terhadap Mahkamah Syariah. C D E

Diputuskan, mengenepikan injunksi dan membenarkan permohonan responden:

(1) Perkara utama permohonan pempetisyen adalah perkara yang secara jelasnya diperuntukkan di dalam undang-undang yang memberikan bidang kuasa ke atas Mahkamah Syariah, oleh yang demikian tidak termasuk bidang kuasa mahkamah ini (lihat perenggan 27). F

(2) Daripada ketika beliau memeluk Islam responden menjadi seorang Muslim dan dirujuk sebagai seorang mualaf. Semenjak itu beliau tertakluk kepada tanggungjawab dan kewajipan seperti mana Muslim yang lain. Sebagai seseorang yang menganut agama Islam, berkenaan dengan undang-undang peribadinya, melainkan dengan jelas dinyatakan sebaliknya, beliau adalah tertakluk kepada bidang kuasa Mahkamah Syariah yang mana mempunyai bidang kuasa eksklusif terhadap mereka yang menganut agama Islam. Oleh yang demikian beliau boleh menggunakan peruntukan s 46(2) Akta Undang-Undang Keluarga Islam (Wilayah-Wilayah Persekutuan) 1984 ('Akta 303') yang mana membenarkannya untuk memohon kepada Mahkamah Syariah untuk mengesahkan pembubaran perkahwinan bukan Muslimnya. Adalah sama, beliau boleh menggunakan peruntukan Bahagian IX Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 ('Akta 505') dan Bahagian VII Akta 303. Menurut peruntukan-peruntukan tersebut responden telah mengemukakan permohonan di hadapan Mahkamah Syariah (lihat perenggan 28). G H I

(3) Perintah injunksi walaupun ditujukan kepada responden sebenarnya adalah satu penangguhan prosiding di Mahkamah Syariah daripada terus mendengar

A dan menentukan permohonan yang dikemukakan di hadapannya oleh responden. Mahkamah Syariah telah menggunakan bidang kuasanya dan membuat perintah berdasarkan permohonannya seperti mana yang diperuntukkan di bawah Akta 303 dan Akta 505. Seksyen 54(b) Akta Relief Spesifik 1950 secara spesifik tidak membenarkan injunksi daripada dibenarkan
B untuk penangguhan prosiding di dalam mahkamah yang bukan bawahannya yang mana injunksi dipohon (lihat perenggan 29).]

Notes

For a case on injunction, application to set aside, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2573.
C For cases on divorce generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3065–3310.
For cases on jurisdiction of the Syariah Court, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 561–589.

D **Cases referred to**

Che Omar bin Che Soh v PP [1988] 2 MLJ 55 (refd)
Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1998] 1 MLJ 681 (folld)
Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793 (refd)
E *Nedunchelian a/l v Uthiradam v Nurshafiqah binti Mah Singai Annal @ Valarmathy a/p Mah Singai Annal & 9 Ors* [2005] 2 AMR 711 (folld)
Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheikh Eusoff bin Sheikh Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai [1997] 3 MLJ 281 (refd)
F *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117 (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 ss 86, 87, 95
Federal Constitution arts 3, 4(1), 121(1A)
G Islamic Family Law (Federal Territories) Act 1984 s 46(2)
Law Reform (Marriage And Divorce) Act 1976 s 51
Specific Relief Act 1950 s 54(b)

Haris Mohd Ibrahim (K Shanmuga, Wee Thiam Seng and Fahri Azzat with him) (Kanesalingam & Co) for the petitioner.
H *Mohamed Haniff Khatri Abdulla (Zainul Rijal Abu Bakar and Wan Khairuddin Wan Montil with him) (Zainul Rijal Talha & Amir) for the respondent.*

Aziah Ali JC:

I

[1] The petitioner had filed a petition for the dissolution of her marriage to the respondent under s 51 of the Law Reform (Marriage And Divorce) Act 1976 (Act 164) on the ground of her husband's conversion to Islam. The petitioner then applied for and obtained an ex parte injunction against the respondent. The respondent then filed an application to set aside the said injunction. Pursuant to

an inter partes hearing, I dismissed the petitioner's application and allowed the respondent's application and set aside the said injunction. The petitioner now appeals against this decision.

[2] The petitioner and the respondent registered their marriage on 26 July 2001 and subsequently went through a Hindu wedding ceremony on 9 March 2002. They have two children from their marriage, the elder son Dharvin Joshua was born on 11 May 2003 and the younger son Sharvind was born on 16 June 2005.

[3] On 11 May 2006, the respondent told the petitioner that he had converted to Islam. The petitioner subsequently received a 'Notis Pemakluman' from the Registrar of the Syariah High Court, Kuala Lumpur dated 14 July 2006 notifying her that the respondent had instituted proceedings for custody of the elder son and that the case has been set for hearing on 14 August 2006. The petitioner says that from the notice it appears that the respondent had changed her son's name to Dharvin Joshua a/l Saravanan @ Muhammad Shazrul Dharvin bin Muhammad Shafi without her knowledge and consent. She avers that she has never consented to the change of her son's religion to Islam.

[4] Subsequent to the filing of a petition for dissolution of her marriage, the petitioner filed an ex parte application (encl 6) praying for the following orders:

(i) Responden secara sendiri atau melalui peguamcaranya, peguam syarie, agen atau dalam apa jua cara pun dihalang dan dilarang dari menukar agama kepada Islam anak-anak dalam perkahwinan DHARVIN JOSHUA (No Sijil Beranak 030511–14–1049) atau SHARVIND (No Sijil Beranak 050616–14–1123) atau mana satu dari mereka;

(ii) Responden secara sendiri atau menerusi peguamcaranya, peguam syarie, agen atau dalam apa cara jua dihalang dan dilarang dari memulakan atau meneruskan sebarang jenis prosiding di dalam mana-mana Mahkamah Syariah berkenaan perkahwinan di antara pempetisyen dengan responden atau berkenaan anak-anak kepada perkahwinan DHARVIN JOSHUA (No Sijil Beranak 030511–14–1049) atau SHARVIND (No Sijil Beranak 050616–14–1123) atau mana satu dari mereka;

(iii) Satu tarikh ditetap untuk pendengaran inter partes permohonan ini; dan/atau

(iv) Untuk perintah yang selanjutnya atau yang lain yang dianggap adil oleh Mahkamah yang Mulia ini.

The grounds that were put forward for the application are as follows:

(a) Responden sedang cuba menyalahguna proses Mahkamah Syariah Kuala Lumpur untuk mendapatkan perintah jagaan anak pempetisyen di mana pempetisyen tidak berhak hadir di hadapan Mahkamah Syariah kerana pempetisyen bukan seorang yang memprofes agam Islam;

(b) Injunksi ini adalah perlu supaya mengelakkan prosiding berganda dan satu penyalahgunaan proses berlaku. Tanpa injunksi tersebut ketidakadilan akan diakibatkan kepada pempetisyen kerana pempetisyen sebagai ibu kanak-kanak tersebut tidak akan dapat didengar di dalam keputusan yang akan dibuat oleh

Mahkamah Syariah (yang akan menyalahi undang-undang) mengenai anak pempetisyen yang bukan di dalam kepentingan terbaik anak tersebut.

[5] The petitioner avers that the respondent is unilaterally attempting to obtain a custody order on her son by abusing the process of the Syariah Court where she has no right to be a party. She avers that the civil court is the court that has the jurisdiction to hear and determine the issue of custody of her minor children where one of the parents is a non-Muslim. The application was allowed in terms (encl 9) and the inter partes hearing was set for 29 August 2006.

[6] On 28 September 2006, the respondent filed an application (encl 10) supported by his affidavit (encl 11) to set aside the order as follows:

(a) perintah ex parte Mahkamah Yang Mulia ini bertarikh 11 Ogos 2006 yang membenarkan pempetisyen untuk satu perintah Injunksi terhadap responden secara ex parte berdasarkan peruntukan A 29 Kaedah-Kaedah Mahkamah Tinggi 1980 diketepikan dan/atau dibatalkan;

(b) kos prosiding ini ditaksirkan dan dibayar serta-merta oleh pempetisyen kepada responden;

(c) lain-lain relif yang mahkamah yang mulia ini anggap wajar dan suai manfaat.

[7] In the respondent's affidavit (encl 11) he states that he and his elder son Dharvin Joshua had converted to Islam on 18 May 2006 and his Muslim name is 'Muhammad Shafi bin Abdullah' whilst his son's Muslim name is 'Muhd Shazrul bin Muhammad Shafi'. The respondent exhibited the 'Kad Perakuan Memeluk Agama Islam' for himself and his son (exhs ST–1A and ST–1B).

[8] The respondent further states that the petitioner had deliberately and knowingly withheld the fact that there is an application for a dissolution of his marriage before the Syariah Subordinate Court, Wilayah Persekutuan (exh ST–5A) which has been set for hearing on 12 September 2006. There is also an interim custody order dated 23 May 2006 issued by the Syariah High Court, Wilayah Persekutuan to him in respect of his son Dharvin Joshua (exh ST–5B). Both these applications were filed earlier in time than the petitioner's application. He has also filed an application for a final custody order in the Syariah High Court, Wilayah Persekutuan (exh ST–6) which was fixed for hearing on 14 August 2006 and later postponed. The respondent avers that the failure of the petitioner to fully disclose to this court these material facts renders the ex parte order dated 11 August 2006 made by this court invalid.

[9] The respondent states that:

(a) the Civil High Court does not have the jurisdiction to issue an injunction to stop or bar the jurisdiction of the Syariah Court;

(b) the Civil High Court has no jurisdiction to hear and determine the matter of custody of his elder son because the son has converted to Islam and the interim injunction obtained by the petitioner is an abuse of process;

(c) the Civil High Court has no jurisdiction to issue and/or maintain an injunction against the Syariah High Court, Wilayah Persekutuan from proceeding with the cases that had been filed through his syariah lawyer.

The reasons put forward by the respondent for the above submissions are as follows:

(i) the ex parte interim order dated 11 August 2006 is later in time and is contrary to the interim order of the Syariah Court dated the 23 May 2006;

(ii) this court has no jurisdiction and/or power in law to issue any injunction against any constitutionally valid court;

(iii) the petitioner should have filed, and had failed to file, an application to set aside the ex parte Syariah Court order dated 23 May 2006.

[10] At the inter partes hearing, counsel for the petitioner informed the court that they are not pursuing the issue of the conversion of the elder child in this proceeding though they dispute his conversion. They have also not disputed that the respondent had converted to Islam. However they are still pursuing the injunction against the respondent from obtaining further orders.

[11] The gist of the petitioner's submissions in support of the injunction is that the jurisdiction to hear and determine all questions relating to the civil marriage between the parties and the children of that marriage vests in the High Court as the said marriage was registered under the provisions of the Law Reform (Marriage And Divorce) Act 1976 (Act 164). It was submitted that the Syariah Court has no jurisdiction as one party to the dispute is not 'a person professing the religion of Islam'. Further the subject matter of the dispute is a marriage registered under Act 164 and the respondent cannot evade his obligations to his wife and children under the said Act by his conversion to Islam.

[12] The petitioner's counsel submitted that the balance of convenience favours the granting of the injunction sought and no prejudice is caused to the respondent as he and the petitioner are entitled to appear before the High Court to be heard. However if the Syariah Court proceedings continue, the petitioner says that she will be prejudiced as orders detrimental to her interests can be made and she will have no chance at all to argue against it and damages will be no compensation.

[13] The respondent's counsel in his submissions in support of the respondent's application to set aside the injunction raised the position of Islam as the religion of the Federation under art 3 of the Federal Constitution and Hukum Syarak as the deciding law for Muslims. Counsel submits that under art 3(1), the Federation is obliged to protect, defend, safeguard Islamic religion and to assist, enable and facilitate Muslims to practice Islam and give effect to, or enforce Islamic injunctions, spiritual and the mundane. Counsel for the respondent submits that due to Islam being the religion of the Federation, despite the fact that the marriage between the parties originated under civil law, the petitioner has no right to petition the High Court for any ancillary reliefs, apart from the dissolution of the marriage, as upon the respondent's conversion Hukum Syarak takes over and the dissolution of the marriage takes effect.

[14] On this issue the petitioner's counsel submits that counsel for the respondent had ignored art 3(4) which provides that 'Nothing in this Article derogates from any other provision of this Constitution'.

[15] Counsel for the petitioner submitted that the term 'Islam' or 'Islamic law' in art 3 of the Federal Constitution has been dealt with in the case of *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 where the Supreme Court considered the question of the meaning of Islam as intended by the framers of the Constitution. The court said, inter alia, at p 56:

> Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only … In our view it is this sense of dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of art 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void.

[16] Thus, counsel for the petitioner submits that art 3(1) which provides that Islam is the religion of the Federation cannot derogate from the provisions of art 4(1) that provides that the Constitution is the supreme law of the Federation. Therefore counsel submits that the dissolution of the marriage must be granted by the High Court as provided under s 51 of Act 164 which provides as follows:

> 51. Dissolution on ground of conversion to Islam
>
> (1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:
>
> Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.
>
> (2) The Court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.
>
> (3) Section 50 shall not apply to any petition for divorce under this section.

[17] In the present case the respondent had applied to the Syariah Court for confirmation of the dissolution of his marriage under s 46(2) of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) which provides as follows:

> 46. Change of religion
>
> (1) The renunciation of Islam by either party to a marriage or his or her conversion to a faith other than Islam shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.
>
> (2) The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.

[18] Counsel for the respondent submits that the respondent has a right to petition to the Syariah Court for confirmation of the dissolution of his marriage under the

abovementioned provision and the petitioner can petition for dissolution of their non-Muslim marriage under s 51 of Act 164. However, he submits that the petitioner cannot apply for ancillary reliefs under the said Act as upon the respondent's conversion Hukum Syarak takes effect on their relationship.

[19] The issue of the jurisdiction of the High Court to hear the petitioner's petition to dissolve her civil marriage under s 51 of Act 164 was dealt with in the case of *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117 where it was held, inter alia, that the Law Reform (Marriage And Divorce) Act 1976 (Act 164) applies to non-Muslims and non-Muslim marriages. The court in the said case states that (at p 124):

> the legislature, by enacting s 51, clearly envisaged a situation that where one party to a non-Muslim marriage converted to Islam, the other party who has not converted may petition to the High Court for divorce and seek ancillary reliefs. In another word, the conversion to Islam of one party to a non-Muslim marriage is made a ground for the other party to apply to the High Court for divorce and ancillary reliefs … From the wordings of s 51(2), the legislature clearly intended to provide ancillary reliefs for non-Muslim spouses and the children of the marriage as a result of one party's conversion to Islam...

[20] Therefore, following the above authority this court can hear and determine the petitioner's petition to dissolve her marriage and also her application for ancillary reliefs and any order made by this court will bind both parties.

[21] In support of the respondent's application to set aside the ex parte injunction, respondent's counsel relied on the issue of jurisdiction of the Syariah Court and the High Court with reference to art 121(1A) of the Federal Constitution. Regarding art 121(1A) the Supreme Court in the case of *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793 said (at p 800):

> It is obvious that the intention of Parliament by art 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court:
>
> > *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1. I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to first see whether the Syariah Court has jurisdiction …

[22] Counsel submits that in determining whether this court or the Syariah Court has jurisdiction, the subject matter approach should be adopted as opposed to the remedy approach submitted by counsel for the petitioner. On this issue, I refer to the case of *Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheikh Eusoff bin Sheikh Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai* [1997] 3 MLJ 281 wherein the court said as follows (at p 293):

> ... [W]hen there is a challenge to the jurisdiction of the High Court, the key is not whether the High Court had jurisdiction, but whether jurisdiction of the matter at hand is with the Syariah Court. Article 121(1A) of the Federal Constitution is not the written law giving jurisdiction to the Syariah court. It merely settles the issue of the concurrent jurisdiction of the Higth Court, in that *there is none when the jurisdiction of a matter is given to the Syariah Court.* (Emphasis added.)

A Jurisdiction of the Syariah court is given by state laws but if state law did not confer on the Syariah court any jurisdiction to deal with any matter in the State List, the Syariah court is precluded from dealing with the matter and jurisdiction cannot be derived by implication.

[23] In the case of *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan,* B *Kuala Lumpur* [1998] 1 MLJ 681, the court said at p 689:

The fact that the plaintiff may not have his remedy in the syariah court would not make the jurisdiction exercisable by the civil court.

C **[24]** Similarly, in the case of *Neduchelian a/l V Uthiradam v Nurshafiqah binti Mah Singai Annal @ Valarmathy a/p Mah Singai Annal & 9 Ors* [2005] 2 AMR 711, the court said:

The court must not lose perspective of the legislative intent that art 121(1A) was to prevent conflict of jurisdiction and not to exacerbate the jurisdictional conflict between the High D Court and the Syariah Court … to my mind the mechanism to be adopted must be predicated by the subject matter rather than the religion of the individual who is challenging the Syariah Court's jurisdiction.

[25] Therefore with respect to the petitioner's counsel's submission that if the E respondent is allowed to continue or proceed with his applications, the petitioner's rights are prejudiced as she cannot appear before the Syariah Court, the cases of *Md Hakim Lee* and *Neduchelian* referred to above apply.

[26] Applying the subject matter approach, what then is the subject matter of the F ex parte injunction sought by the petitioner upon which the order dated 11 August 2006 was granted and which the respondent now seeks to set aside? The petitioner's first prayer seeks to stop the respondent from converting his children (at the time this matter was heard, the petitioner's counsel confined his submissions in respect of the younger child only). Through the second prayer the petitioner seeks to stop the respondent from pursuing or continuing with his proceedings in the Syariah Court G in respect of any matters pertaining to his non-Muslim marriage and/or to either of his children.

[27] In respect of the first prayer, I refer to Part IX of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505). This part deals with the subject matter H of conversion to Islam. Section 95 deals with capacity to convert into Islam in respect of those who have attained the age of eighteen years and those who have not. In the case of minors, the section confers authority on his parent or guardian to give consent. In respect of the second prayer, s 46(2) of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) provides that the conversion to Islam by I either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the court. Therefore, the Syariah Court can make an order confirming the dissolution of the respondent's non-Muslim marriage. In Part VII of Act 303 are provisions relating to matters of guardianship and custody. Therefore following the case of *Shaik Zolkaffily bin Shaik Natar & Ors v Majlis Agama Islam Pulau Pinang dan Seberang Perai*, I find that the subject matter

of the petitioner's application are matters that are expressly provided for in the laws conferring jurisdiction on the Syariah Court thereby excluding the jurisdiction of this court.

[28] From the moment of his conversion to Islam, the respondent became a Muslim and is referred to as a muallaf. From then on, he becomes subject to the same duties and obligations as any other Muslim (see ss 86 and 87 of Act 505). As a person professing the religion of Islam, in matters of his personal law, unless expressly provided otherwise, he is subject to the jurisdiction of the Syariah Court which has exclusive jurisdiction over persons professing the religion of Islam. Therefore, he can avail himself of the provisions of s 46(2) of Act 303 which allows him to apply to the Syariah Court for confirmation of the dissolution of his non-Muslim marriage. Similarly, he can avail himself of the provisions of Part IX of Act 505 and Part VII of Act 303. Pursuant to those provisions, the respondent had placed applications before the Syariah Court.

[29] With regard to the injunction order made on 11 August 2006, counsel for the petitioner argued that the order is against the respondent and not against the Syariah Court. However, I agree with submissions of the respondent's counsel that this order though addressed at the respondent is in effect a stay of proceedings in the Syariah Court from further hearing and determining the applications placed before it by the respondent. The Syariah Court has exercised its jurisdiction and made orders on his applications as provided for under Act 303 and Act 505. Section 54(b) of the Specific Relief Act 1950 (Act 137) specifically disallows injunctions from being granted to stay proceedings in a court not subordinate to that from which the injunction is sought.

[30] Thus for the above reasons I set aside the injunction dated 11 August 2006 granted to the petitioner and allowed the respondent's application as prayed.

Petitioner's injunction set aside. Respondent's application allowed.

Reported by Loo Lai Mee